No. 87-1555

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

James H. Burnley IV, Secretary,
Department of Transportation, et al.,
Petitioners

v.

Railway Labor Executives' Association, et al.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. INTRODUCTION

The amicus curiae, Southern California Rapid Transit District, supports the Secretary's and Administrator's (the Government) petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The District's brief is submitted pursuant to United States Supreme Court Rule 36.4. The Court should grant the petition to review the judgment of the court of appeals, which enjoined enforcement of regulations promulgated by the Federal Railroad Administration requiring and permitting toxicologic tests of railroad employees involved in collisions and in other specified circumstances.

II. INTEREST OF THE AMICUS CURIAE

The Southern California Rapid Transit District is a political subdivision of the State of California. Cal. Pub. Util. Code §30000 *et seq.*; Cal. Labor Code §1721. It is engaged as a common carrier in the business of transporting members of the general public in and about Los Angeles County. *Lopez* v. *Southern California Rapid Transit District*, 49 Cal.3d 780, 784, 221 Cal.Rptr. 840, 841, 710 P.2d 907 (1985). The District operates the largest all-bus mass

transit system in the United States.

The scale of the District's operations is enormous; and the environment in which it operates is daunting. The twenty-three hundred bus fleet is part of a surface transportation system rapidly approaching its physical limits. *Taxpayers Watchdog, Inc.* v. *Stanley*, Case Number 86-2455 (D.D.C. 1986), *aff'd*, 819 F.2d. 294 (D.C. Cir. 1987). Los Angeles' core will shortly face daily gridlock. *Id*. The District operates as many as one hundred buses per hour on a single street during peak periods. *Id*. "Against this nightmarish backdrop of traffic congestion", *id*., the District carries 1.3 million passengers each day, nearly one-half billion people each year. Five thousand bus operators are employed to accomplish this behemoth task.

The standard of care with which the District must transport its passengers, as with most common carriers, is the highest. Bus operators must "'use the utmost care and diligence for safe carriage [of passengers] . . . and must exercise to that end a reasonable degree of skill.'" *Lopez, supra*, 49 Cal. 3d at 785, 221 Cal.Rptr. at 842, *quoting*, Cal. Civ. Code §2100. The District must "do all that human care, vigilance, and foresight reasonably can do under the circumstances." *Id*. It is precisely from this highest legal standard of care, (which the District shares with other transportation modalities such as railroads), grafted upon the massive bus network with its daily import to the public's safety, that the District's vital interest in the outcome of the instant case is derived.

Along with the railroad and airline industries, the District experienced a crisis in drug abuse by its employees which reached its zenith in 1986. Buses were involved in several spectacular crashes, injuring scores of passengers and killing one. The bus operators were found to have illicit drugs coursing through their systems. The resulting widespread negative publicity spread as far as New York City, and saturated the Southern California area, shaking public confidence in the District's ability to provide an

efficient transit service. Aside from the demonstrated endangerment of the public's safety, the District's employees were, themselves, justifiably concerned over the abuse of controlled substances by their fellow employees and the impairment of their right to a safe and drug-free workplace.

In response to this public outcry, and to meet its obligation to provide a healthy working environment, the District strengthened its drug and alcohol abuse policy, in large part tracking the Federal Railroad Administration's regulations at issue in the case at bench. In summary terms, the District's policy requires toxicologic urinalysis upon one of two triggering events. The first is "reasonable suspicion"; that is, when a supervisor articulates facts from which a reasonable suspicion arises that the bus operator possesses, is under the influence of, or is impaired by, controlled substances or alcohol.

The second trigger is a set of incidents intended to control supervisorial discretion when ordering a urinalysis. When there is a vehicle collision with a specified threshold of property damage or when there is a personal injury or fatality, bus operators are required to submit a urine sample for analysis.

Absent this Court's plenary review of this case, the District's drug and alcohol abuse policy and, quite frankly, that of many public transit operators throughout the United States, will be thrown into a legal quandary. Aside from the direct impact of the Ninth Circuit's opinion on the District's policy, the conflict between that opinion and the decisions of several United States Courts of Appeals, *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976); *McDonnell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Shoemaker* v. *Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, _____ U.S. _____, 107 S.Ct. 577, 93 L.Ed. 2d 580 (1986); *Nat'l Treasury Employees Union* v. *Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, Case Number 86-1879 (2-29-88), affords a blurred line, at best, to follow.

The amicus' interest in this Court's review is particularly heightened by the grant of certiorari to review the decision this term, of the United States Court of Appeal for the Fifth Circuit. *NTEU* v. *Von Raab*, *supra*. The *Von Raab* case, as explained in the Government's petition, will not provide adequate guidance for the courts and the transportation industry. *Petition for Writ of Certiorari* at 14. The District's efforts to provide safe mass transit and a drug-free workplace, would be particularly vulnerable given the continued viability of the Ninth Circuit's judgment. Transit operators in all jurisdictions would still lack clear constitutional parameters within which to continue drug abatement policies. The clear and present danger to public safety by railroad employees, bus operators, and airline pilots who use illegal drugs, does not afford the luxury of time for lower courts to wrestle with issues left unresolved by *Von Raab*.

Part of the District's interest in this case arises from the fact that it is a party to a case in the United States District Court for the Central District of California, in which the same issue is presented to the court; that is, the constitutional validity of a drug and alcohol abuse policy patterned upon the regulations of the Federal Railroad Administration. *Stolpe* v. *Southern California Rapid Transit District*, Case Number CV 87-07734 KN (C.D. Cal.). The interest of the District also arises from the fact that it is a party to three cases in the Superior Court of the State of California, in which this same issue is presented to the court. *Amalgamated Transit Union, et al.* v. *Southern California Rapid Transit District*, Case Number C 628 562 (Los Angeles Sup. Ct.); *Riojas* v. *Southern California Rapid Transit District*, Case Number C 647 557 (Los Angeles Sup. Ct.); *Lang* v. *Southern California Rapid Transit District*, Case Number C 625 916 (Los Angeles Sup. Ct.).

The District is vitally interested in this Court's granting of the Government's petition for writ of certiorari, because the entire subject is ripe for resolution as is evidenced by: the

nationally recognized problem of drugs in the workplace, and the granting of the certiorari petition in the the case now pending, *NTEU* v. *Von Raab*, *supra*, which addresses somewhat different aspects of this subject. The public's interest in safe modalities of mass transit demands that the attempts of transit operators to address and curb the use of controlled substances and alcohol at work, not be left in a legal shadow.

III. SUMMARY OF ARGUMENT

This Court should grant the Government's petition for writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, for two reasons. Principally, invalidation of the Federal Railroad Administration's regulations governing toxicologic testing of railroad crews, has thrown the state of the law in this area of national concern, into disarray, particularly in light of the conflicting decisions from other circuits.

The negative impact, or at least the uncertainty, created by the Ninth Circuit's majority opinion, bodes ill for the assurance and provision of safe mass transit to the public. The railroads, airlines, and bus carriers, and ultimately, their passengers, are all potential victims of this unfounded judgment. The crisis of illicit drugs in America, particularly its infusion in the workplace, should not be permitted to run its course in the "laboratories" of the transportation industry, before securing constitutional interpretation from this Court. The writ should be granted, for reason of this dire need and, because the opinion of the circuit court is in direct conflict with the opinions of the other circuits. Uncertainty in the law is ill afforded in this vital area of public concern.

The search and seizure entailed in the challenged regulations are analyzed under the Fourth Amendment to the United States Constitution. The court of appeals inaccurately weighted the two critical factors in the balancing test. The compelling governmental interest in rail safety (and, in general, safe mass transit), far outweighs the

drastically reduced privacy expectation of railroad crew members. Thus, an individualized suspicion of drug or alcohol use, is not the sole and necessary antecedent to a toxicologic test. Instead, measuring the reasonableness of the search in light of all the circumstances, the gravity of the government's interest here permits other standards, such as exist in the Federal Railroad Administration's regulations, to control the searcher's discretion (in lieu of a reasonable suspicion).

This Court's opinions have conclusively established that a private citizen who operates any motor vehicle, even a motor *home*, has a sharply diminished expectation of privacy given both the mobility of a motor vehicle and the intense and pervasive governmental regulation of such vehicles. The resulting diminution in the expectation of privacy not only applies to an individual employed for the very purpose of operating a vehicle such as a train, bus, or plane; it applies with synergistic force to one who so dramatically affects the public's safety as the engineer, bus operator, or pilot who is carrying innocent passengers.

The Court of Appeals for the Ninth Circuit failed to consider the nature of a railroad crew member's job which, as with a bus operator or airline pilot, includes accident investigation and accident prevention. This quintessential factor which serves to reduce the expectation of privacy to its lowest ebb, differentiates the train crew member or other mass transit operator from the ordinary motorist and motor home occupant, (the latter also hold reduced privacy expectations), by the very fact that a principal part of the crew member's job duties is the prevention and *investigation* of collisions.

In order to thoroughly investigate a "human factors" accident, (one in which human error may have been a contributing cause), both for purpose of ascertaining the cause of the particular collision and to hopefully prevent a recurrence, the variable of illicit drug use or alcohol abuse must be ruled out. As the United States Department of

Transportation has recognized in establishing medical standards for over-the-road drivers, 49 C.F.R. §391.41(12) (1987), the sole means for detecting current drug use is a serologic test. *See*, 49 C.F.R. §391.43 (form includes laboratory's serologic data). The Federal Railroad Administration acted with reason and in concordance with Fourth Amendment parameters, by requiring toxicologic tests of railroad crew members involved in train accidents. The judgment of the court of appeals failed to consider this important governmental purpose which formed the foundation for the regulations.

The need for review by certiorari is patent in view of the conflicting opinions from other circuit courts, and in light of the partial completion of the legal tableau by this Court's forthcoming decision in the case in which a petition for writ of certiorari has been granted. To leave the remainder of the canvas unfinished, would be ill advised in light of this Nation's struggle with the refractory problem of drug abuse. The potential for disaster is nowhere more inviting than in the transportation industry. The time for decision by this Court is not only ripe; it is vitally needed to remove the cloud of uncertainty that has settled upon transit operators from the anomalous decision by the court of appeals. The Government's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit should be granted.

IV. ARGUMENT

The Regulations Of The Federal Railroad Administration Are Constitutional Because Railroad Train Crew Members Do Not Have A Reasonable Expectation of Privacy In Blood and Urine Specimens Following Collisions and Fatalities.

This case presents for resolution the validity of the Federal Railroad Administration's regulations, (requiring and permitting toxicologic tests of railroad crew members), under the Fourth Amendment to the United States Constitution. The dispositive issue, "is whether or not [the] search

or seizure is reasonable under all the circumstances." *United States* v. *Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed. 2d 538 (1977) (citation omitted). This test of reason in Fourth Amendment analysis, does not demand a warrant in all circumstances, *Camara* v. *Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967); nor is there an irreducible minimum of a reasonable suspicion required in every instance. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed. 2d 720 (1985). The standard of reason when applied to a search and seizure, instead, is measured by "'balancing the need to search [or seize] against the invasion which the search [or seizure] entails." [Citation omitted]." *New York* v. *Class*, 475 U.S. 106, 116, 106 S.Ct. 960, 967, 89 L.Ed. 2d 81, 92 (1986), *quoting*, *Terry* v. *Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

When this measure is applied to the Federal Railroad Administration's regulations, it is readily apparent that the particular circumstances which distinguish the occupation of railroad crew member from the general population, (operation of a vehicle with concomitant duties to investigate and prevent accidents), lead inexorably to the conclusion that the required submission of blood or urine samples following a collision or loss of life, is eminently reasonable. This administrative search passes constitutional muster.

The Fourth Amendment's reach is not a mere litmus test turning upon the presence or absence of a physical intrusion in a particular enclosure or zone. *United States* v. *Knotts*, 460 U.S. 276, 280, 103 S.Ct. 1081, 1084, 75 L.Ed. 2d 55 (1983), *quoting*, *Katz* v. *United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed. 2d 576 (1967). The place to be searched is not dispositive, for it is people and not places which are the subject of the Fourth Amendment's protective cloak. *Katz* v. *United States*, *supra*. However, the fact that the submission of body fluid specimens is the result of vehicle operations, strongly influences the balancing test.

This Court has repeatedly observed that a motor vehicle

has a unique status in Fourth Amendment analysis. While a link has not yet been drawn to rail cars, the factors from which the motor vehicle derives its status will be seen to correspond with rolling stock. The decision of the Court of Appeals for the Ninth Circuit, the review of which is sought in the instant petition, applies with equal force to vehicles such as buses, interurban mass transit rail vehicles, and airplanes. The factors governing the treatment of automobiles in Fourth Amendment cases, are intertwined throughout the transit industry, and bear upon the approach to the present analysis.

> [T]his Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts.

United States v. *Chadwick*, 433 U.S. at 12, 97 S.Ct. at 2484.

This treatment of motor vehicles has been premised in part upon their inherent mobility, *id.*, a factor indisputably common to rail cars, buses, and airplanes.

> The Court has recognized that the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein:
>
> > 'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.' [Citation omitted].

New York v. *Class*, 475 U.S. at 112-13, 106 S.Ct. at 965, 89 L.Ed. 2d at 89.

A rail car, bus, and plane not only share the ready mobility of an automobile; it is clear that they are never used as one's home in the case of public transit; nor does

the rail crew member, bus operator, or airline pilot maintain the type of personal effects therein such as are reposed in the home. The openness to public view and the primary transportation function are two factors this Court has identified in creating the automobile exception to the Fourth Amendment's warrant requirement. These factors are apposite with equal force to rail cars, buses, and airplanes, and thus form the basis for assessing the regulations of the Federal Railroad Administration in terms of the automobile exception.

Yet another factor enunciated in the decisions concerning search and seizure of automobiles, is present in the instances of rail cars, buses, and airplanes. This critical factor was held to be absent by the court of appeals in the case at bench, without consideration of the very cases which identified the element. That is, "automobiles are justifiably the subject of pervasive regulation by the State. *Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy . . . .*" *New York* v. *Class*, 475 U.S. at 113, 106 S.Ct. at 965, 89 L.Ed. 2d at 90 (emphasis added).

"States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways." *United States v. Chadwick*, 433 U.S. at 13, 97 S.Ct. at 2484, *citing*, *Cady* v. *Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed. 2d 706 (1973). Railroads are equally subject to extensive regulations in terms of the condition and manner in which crew members must operate. In the instance of this amicus, the State of California has not only provided for the usual pervasive regulation of bus operations upon the streets and highways; but more important to the Fourth Amendment expection of privacy analysis, the operators, themselves, are at least as heavily regulated as the jockeys of *Shoemaker* v. *Handel*, *supra*.

It is true that the container, in this case a rail car, does

not, alone, limit or expand the legitimate privacy expectation of the person being searched. Nevertheless, if a member of the public who is driving an automobile has a reduced privacy expectation by virtue of the ready mobility and pervasive governmental regulation of that vehicle , then it is equally certain that employees who, themselves, are subject to intense regulation in the operation of readily mobile, pervasively regulated vehicles, have drastically reduced privacy expectations when receiving wages for operating the vehicles, and investigating and preventing accidents. In short, a railroad employee's privacy expectation is sufficiently reduced to permit incident triggers for toxicologic tests, rather than individualized suspicion, because both the employee and the industry are extensively regulated and the jo' duties include accident prevention and investigatic ı.

The ami is Southern California Rapid Transit District, is liable fr injuries caused by employees' negligent acts or omissio s in the operation of motor vehicles, notwithstanding sovereign immunity. *City of San Jose* v. *Superior Court,* 166 Cal.App.3d 695, 698, 212 Cal.Rptr. 661, 662 (1985). The standard of care to which bus operators, and in turn this amicus, is held, is extraordinarily high. The duty owed passengers requires the operator "to do all that human care, vigilance, and foresight reasonably can do under the circumstances." *Lopez* v. *Southern California Rapid Transit District*, 49 Cal.3d at 785, 221 Cal.Rptr. 840 at 842. As previously noted, this amicus and all common carriers including railroads, owe their passengers the highest standard of care which the law imposes, Cal. Civil Code §2100, and must "provide for the safe carriage of those specific individuals who have accepted the carriers' offer of transportation and have put their safety, and even their lives, in the carrier's hands." *Lopez*, 49 Cal.3d at 790, 221 Cal. Rptr. at 846. Thus, railroad crew members, bus operators, and airline pilots accept their jobs with the explicit understanding that their job duties not only entail

the operation of a pervasively regulated vehicle; but as well that as a carrier for hire, they are subjected to an exponentially greater scrutiny in terms of their operation of the respective transit modalities, than the private motor vehicle driver described in this Court's several decisions delineating the automobile exception to the Fourth Amendment's warrant requirement.

There is yet another obligation imposed upon common carriers which dramatically reduces a railroad crew member's, bus operator's, or pilot's, reasonable expectation of privacy. As described above, the standard of care in carrying passengers safely and without accident is the utmost. That other duty is to fully investigate a collision, once such an unfortunate event has transpired. That portion of the investigative process which seeks to identify the causes of a collision in order to prevent a recurrence, is a corollary of the duty to ensure passengers' safety. The Federal Railroad Administration has recognized this ancillary obligation in promulgating the regulations at issue. 50 Fed. Reg. 31541 (1985).

Once a collision has occurred, the common carrier has an independent duty to provide care for the victims. *Restatement (Second) of Torts* §314A (1979). A part of this obligation is, "to collect and preserve information concerning the [accident] for use by the carriers' passengers in future civil litigation." *De Vera* v. *Long Beach Public Transportation Co.*, 180 Cal.App.3d 782, 795, 225 Cal.Rptr. 789, 795 (1986). Bus operators, railroad crew members, and pilots, then, receive wages in part for fulfilling the carrier's duty to fully investigate collisions. A reasonable and necessary part of accident investigation is the determination whether human error was a contributing cause. The collection of a body fluid sample to rule out accidental impairment resulting from prescribed medication, or wrongdoing by ingestion of illicit drugs, is a critical aspect of the carrier's duty to safely transport passengers while exercising the very highest standard of care.

In the instance of bus operators, they have for years been employed on the condition they submit a serologic sample in order to receive the medical certificate required to operate a bus. *See*, 49 C.F.R. §§391.41(3), (12), and (13); 391.43 (form). Thus, there can be no reasonable expectation of privacy in the collection of a blood or urine sample following a traffic collision, merely because it has occurred at a different time than the biennial medical certification.

The crucial point is that as with the jockeys in *Shoemaker* v. *Handel*, *supra*, whose livelihood was dependent upon the public's confidence that a horse race was not influenced by chemicals; railroad crew members, bus operators, and airline pilots do not have a reasonable expectation of privacy in blood or urine samples following an accident, because their very job and the wages they receive are inclusive of assurance to the public that their carriage will be safe, and that accidents will be thoroughly investigated to ascertain their cause and to prevent their recurrence.

This Court should grant the Government's petition for a writ of certiorari, because the search called for in the challenged regulations was not considered in its proper context by the court of appeals; and this important matter of public safety will not be resolved by the decision in *National Treasury Employees Union v. Von Raab*, *supra*.

"These reduced expectations of privacy derive . . . from the pervasive regulation of vehicles capable of traveling on the public highways", *California* v. *Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed. 2d 406, 413 (1985) (citation omitted); and this factor, applying as it does with equal force to a vehicle that operates on rails and crosses public highways, was rejected by the court of appeals. The minimally intrusive search countenanced by the Federal Railroad Administration's regulations, in light of the compelling government interest in providing efficient mass transit and safe operation of rail cars, buses, and airplanes, is not an embryonic legal development, but has been previously approved in areas where the precipitously reduced

expectation of privacy on the part of the person being searched did not even exist. Judge, and now Justice, Anthony Kennedy wrote for the court of appeals, that searches of persons entering a security-sensitive building need not be conducted upon warrant. *McMorris* v. *Alioto*, 567 F.2d 897, 899 (9th Cir. 1978). Justice Kennedy observed, while sitting on the court of appeals, that similar searches, using a magnetometer, had been judicially approved in the instance of passengers seeking to board an airplane. *Id.*, 567 F.2d at 901. Indeed, it would be skew line in the law, to permit passengers to be searched before boarding a plane in order to prevent highjacking, while precluding a post-accident search of the pilot to rule out the human error of alcohol use or drug abuse in order to prevent future loss of life and limb occasioned by a crash. Yet, in the context of the railroad, with its equal potential for destruction of human lives, that is precisely the aberration contemplated by the judgment of the court of appeals.

The type of administrative search which the Federal Railroad Administration has approved after an intensive two-year study, is not constitutionally different from the judicially approved, limited, administrative searches to assure public safety in buildings, *United States* v. *Martell*, 654 F.2d 1356, 1361 (9th Cir. 1981); or the administrative search approved in the pervasively regulated drug industry. *United States* v. *Greenberg*, 334 F.Supp. 364, 19 A.L.R. Fed. 731 (W.D. Pa. 1971). On balance, the regulations call for a search which is eminently reasonable under all of the circumstances.

The need for this Court's guidance is apparent both from the broad impact of the appellate court's decision, and the concomitant negative effect on the public's safety; and from the granting of the petition for writ of certiorari in *NTEU* v. *Von Raab*.

V. CONCLUSION

The petition for a writ of certiorari to review the judgment of the court of appeals should be granted. State courts and

lower federal courts have grappled for several years with the intractable problem of drug and alcohol use and government's power to banish this nemesis from the work environment. A body of judicial decisions had emerged which provided government entities with a fair degree of guidance.

In the instance of railroads and mass transit operators, it had become readily apparent that urgent measures were necessary to control the loss of life, limb, and property that followed from crew members' and bus operators' use of drugs and alcohol. The Federal Railroad Administration rationally responded to the crisis, with narrowly drawn regulations requiring and permitting investigatory toxicologic tests. The light cast by the judicial decisions on toxicologic tests, showed the regulations to be within the ambit of reasonable searches and seizures under the Fourth Amendment to the United States Constitution. The judgment of the United States Court of Appeals for the Ninth Circuit is dissonant from this body of state and federal court decisions.

Plenary review by this Court is appropriate, because the issue has wended its way through lower courts and the need for final resolution is critical. Public safety, and the threat posed to it by railroad and other common carriers whose employees have drugs or alcohol in their systems, do not admit of luxury of time to experiment with a judgment that proscribes constitutionally valid actions to eliminate drug and alcohol use by safety-sensitive employees.

The judgment clearly conflicts with the decision of the Courts of Appeals for the Third, Fifth, Seventh, and Eighth Circuits. The petition should be granted to resolve this conflict and to prevent further hazard to the public. The District has had great success in reducing drug and alcohol use in the workplace, by enforcement of a policy similar to the challenged regulations.

In September, 1985, eighteen point twenty-eight percent

(18.28%) of the District's bus operators tested, had illegal drugs in their systems while at work.[1/] This alarmingly high proportion of bus operators transporting passengers while using drugs, declined to two point eighty-three percent (2.83%) by February, 1988.[2/] The judgment of the court of appeals imperils the District's reduction of the dangers posed by bus operators who ingest illicit drugs and alcohol, in addition to the jeopardy in which rail safety has been placed. The District, of course, is not alone in this respect. Since at least 1976, following the decision in *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976), mass transit operators nationwide have implemented policies to eliminate drug and alcohol use by bus operators and train crew members. Review by this Court is imperative if carriers, their passengers, and the public at large, are to avoid the hazard posed by this decision.

The conflict between the Ninth Circuit's judgment and those of other courts of appeals, leaves this Nation to row a course between the Scylla of transit operators in the Ninth Circuit barred from enforcing sound drug abuse policies; and the Charybdis of railroads, mass transit carriers, and airlines across the country, all chilled in their response to the profound risk posed by crew members and drivers with drugs or alcohol in their systems.

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[1] *Affidavit of Elia N. Hager, R.N.* at 3 (attached to this brief).

[2] *Affidavit of Elia N. Hager, R.N.* at 4 (attached to this brief).

The Southern California Rapid Transit District urges the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

SUZANNE B. GIFFORD
General Counsel

By _____
Richard A. Katzman
Acting Senior Assoc. Counsel

April, 1988

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, ELIA N. HAGER, R.N., being first duly sworn, do solemnly depose that:

1. I am a registered nurse in the State of California, employed by the Southern California Rapid Transit District for the purpose of administering the Alcohol and Drug Abuse Policy. I receive and maintain all laboratory reports of the urine specimens submitted by District employees pursuant to the Policy.

2. I have examined my records of all bus operators who received a urinalysis for controlled substances and alcohol, from the inception of the Policy on September 1, 1985, up to the present.

3. I found that in September, 1985, eighteen point twenty-eight percent (18.28%) of the bus operators who were tested, had one or more controlled substances in their systems, without a valid prescription. This proportion of operators driving buses with controlled substances in their bodies has steadily declined since the Policy's implementation, with the exception of a few aberrant months.

4. By the end of February, 1988, the percentage of bus operators who had a urinalysis indicating the presence of controlled substances, had dropped to two point eighty-three percent (2.83%).

Elia N. Hager, R.N., Affiant

Before me, the undersigned authority, appeared the person known to me as Elia N. Hager, R.N., who, being first duly sworn, deposed that the factual statements in this affidavit are true and correct.

Subscribed and sworn to before me, on this day of April, 1988.

_____

Notary Public

(Seal)